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his land he may demand a "reasonable price"²⁹ or "just compensation."³⁰

James A. Hobbs

MINERAL RIGHTS—RIGHT TO PARTITION—SERVITUDES CREATED
BY RESERVATION IN SALE OF LAND

Defendant bought a 4000 acre tract of land, the vendor retaining one-half of the minerals. The plaintiff then bought the vendor's interest and brought suit against defendant for partition, claiming that, as owner of one-half of the minerals, he was a co-owner with the defendant. *Held*, that the plaintiff owned a complete servitude, an entire right to explore on the defendant's land and to retain one-half of the minerals extracted, and therefore he was not entitled to partition. *Starr Davis Oil Company v. Webber*, 218 La. 231, 48 So. 2d 906 (1950).

There is no question as to the nature of this servitude which the plaintiff owned. The courts have repeatedly held that a sale or reservation of the minerals in a tract of land constitutes a sale or reservation of a right to go upon all parts of the land and to explore for minerals and to retain the amount stipulated in the contract.¹

At the time of the sale and until minerals are actually produced from the land, there is nothing which can be the subject of ownership by this conveyance except a right of search, with the right to keep half of the minerals, if and when found. It is only this right of search with which we are concerned in this attempt to partition.

Before there can be a partition there must be co-ownership.² Land held by co-owners may be partitioned³ either in kind or by

29. 33 U.S.C.A. § 702d (1950).

30. 33 U.S.C.A. § 595 (1950); U. S. Const., Amend. V.

1. *Rives v. Gulf Refining Co.*, 133 La. 178, 62 So. 623 (1913). See also *Palmer Corp. v. Moore*, 171 La. 774, 132 So. 229 (1930), and list of cases there. For a more recent case see *Standard Oil Co. v. Futral*, 204 La. 215, 15 So. 2d 65 (1943).

2. See *Daggett, Mineral Rights in Louisiana* 230-46 (1949).

3. Art. 1289, La. Civil Code of 1870: "No one can be compelled to hold property with another, unless the contrary has been agreed upon; anyone has a right to demand the division of a thing held in common, by the action of partition."

Art. 1308: "The action of partition will not only lie between co-heirs and co-legatees, but between all persons who hold property in common, from whatever cause they may hold in common."

Art. 1311: "Partitions can be sued for not only by the majority of heirs, but by each of them, so that one heir alone can force all the rest to partition at his instance."

Moreover, co-owners of land cannot explore for minerals on the common

licitation.⁴ There seems to be no reason why a servitude owned by two or more persons may not be partitioned by licitation.⁵

However, the facts of this case are not in any way like the above situations of co-ownership since the plaintiff by himself had a complete right to go upon the defendant's land to explore. Article 656 of the Louisiana Civil Code of 1870⁶ makes impossible the ownership of only a part of the "rights of servitudes." Each owner of a servitude on the same tract of land has, in fact, a complete right to exercise the same privileges.⁷ Therefore, since the plaintiff in this case had the complete right to go on the defendant's land to explore, he cannot be said to have been a co-owner. "The theory of partition is between the owners of the thing held 'in common'."⁸ Therefore, how can something not held in common, owned in its entirety by only one person, be the subject of an action to partition?⁹

The holding in this case is entirely consistent with the prior jurisprudence which has developed in regard to mineral servitudes. The plaintiff erred in contending that there was a limita-

land without the consent of the other co-owners, and therefore, one co-owner cannot alone confer a complete right to explore. See *Gulf Refining Co. v. Carroll*, 145 La. 299, 82 So. 277 (1919); Art. 738, La. Civil Code of 1870: "The coproprietor of an undivided estate can not impose a servitude thereon, without the consent of his coproprietor."

"The contract of servitude, however, is not null; its execution is suspended until the consent of the coproprietor is given."

However, the servitude owner has a remedy in being able to force his vendor to partition the common land, under Art. 740, La. Civil Code of 1870: "If the coproprietor has established the servitude for his part of the estate only, the consent of the other owners is not necessary, but the exercise of the servitude must be suspended, until his part be ascertained by a partition. In this case, he to whom the servitude has been granted, may compel the coproprietor from whom he received it, to sue for a partition, or may sue for it himself."

4. Art. 1339, La. Civil Code of 1870: "When the property is indivisible by its nature, or when it can not be conveniently divided, the judge shall order, at the instance of any one of the heirs, on proof of either of these facts, that it shall be sold at public auction, after the time of notice and advertisements prescribed by law, and in the manner hereinafter prescribed."

See also *Gulf Refining Co. v. Hayne*, 138 La. 555, 70 So. 509 (1915); *Sellwood v. Phillips*, 185 La. 1045, 171 So. 440 (1936).

5. Art. 1289, La. Civil Code of 1870, *supra* note 3. See *Daggett*, *op. cit. supra* note 2, at § 56.

6. Art. 656: "The rights of servitudes, considered in themselves, are not susceptible of division, either real or imaginary. It is impossible that an estate should have upon another estate part of a right of way, or of view, or any other right of servitude, and also that an estate be charged with a part of a servitude."

"The use of a right of servitude may be limited to certain days or hours; but thus limited, it is an entire right, and not part of a right."

7. *Clark v. Tensas Delta Land Co.*, 172 La. 913, 136 So. 1 (1931).

8. *Daggett*, *op. cit. supra* note 2, at 240. See also Arts. 1289, 1308 and 1311, La. Civil Code of 1870, quoted *supra* at note 3.

9. *Clark v. Tensas Delta Land Co.*, 172 La. 913, 136 So. 1 (1931).

tion on his right to explore inasmuch as the defendant landowner could "exercise the identical right."¹⁰ The error is one that could easily have been avoided had the nature of the servitude owned by the plaintiff been kept in mind. This servitude should have been distinguished from the right also owned by the plaintiff to retain one-half of any minerals extracted from the defendant's land. The error of failing to recognize this distinction led the plaintiff to believe that he held a right in common with the defendant, subject to partition, while in reality each held a complete right to explore the entire tract of land, and each had a right to one-half of the benefits of this exploration.

William W. Bell, Jr.

NEGATIVE IMPLICATIONS OF THE COMMERCE CLAUSE—STATE
TAXATION OF INTERSTATE TRANSPORTATION

Connecticut sought to impose an apportioned net income tax, applicable to all corporations, on the Spector Motor Service. Spector, a Missouri corporation, was engaged in exclusively interstate trucking. It was authorized by the Interstate Commerce Commission and the Connecticut Public Utilities Commission to do interstate trucking, but was not licensed by Connecticut to do and did not do intrastate trucking. Although full truckload shipments were loaded directly into the interstate carrier, two terminals were operated in the state, wherein small shipments were assembled into truckloads. Spector employed twenty-seven full-time employees in Connecticut, with a payroll in excess of \$1,200.00 a week. *Held*, unconstitutional. A state cannot levy a net income tax on an exclusively interstate transportation company, regardless of apportionment. *Spector Motor Service, Incorporated v. O'Connor*, 71 S. Ct. 508 (U.S. 1951).

The instant case, in effect, overrules the *Memphis*¹ and *Interstate Pipe Line*² cases, the continued validity of which was questionable after the passing of Justices Rutledge and Murphy. The *Memphis* case held an apportioned franchise tax valid on a pipe line company which under the decision had no intrastate activity. The *Interstate* case sustained a gross receipts tax on a pipe line; the tax was self-apportioning, since all of the line was within Mississippi. The opinion of the court held that it was immaterial whether the company was engaged in interstate commerce or not.

10. *Starr Davis Oil Co. v. Webber*, 218 La. 231, 48 So. 2d 906, 907 (1950).

1. *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948).

2. *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662 (1949).